Supreme Court, U.S.
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99 627 AUG 17 1999
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October 4, 1999 Term

EILEEN WALDEN DANIELS,
Petitioner

v.

PA PUBLIC UTILITY COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Eileen Walden Daniels, Pro Se
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5199

QUESTION PRESENTED

Whether a state agency's adjudication upheld on appellate review is subject to collateral attack, if its fraudulent action to avert judicial scrutiny of its authority to infringe a constitutional right was not timely determined to defend against the action?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Eileen Walden Daniels respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The April 20, 1999 Opinion and Order of the Court of Appeals for the Third Circuit whose judgment is herein sought to be reviewed is unreported, and is reprinted in the Appendix to this Petition at App. 1. The prior Memorandum and Order of the U.S. District Court for the Eastern District of PA, case No. 98-1524, entered July 16, 1998, publication undetermined, is reprinted in the Appendix to this Petition at App. 10.

JURISDICTION

The judgment for the Court of Appeals was filed on April 20, 1999, see App. 8. A Petition for Rehearing was denied on May 19, 1999, see App. 21. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. @ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the provisions cited appears in the Appendix to this Petition at App. 22.

Article I, Section 10, U.S. Constitution
Amendment 14, Section 1, U.S. Constitution
PA Consolidated Statutes
PA 1986 Public Law 114
PA Public Utility Code

STATEMENT OF THE CASE

This is a personal property claim and independent action for fraud barring res judicata challenge brought by the Petitioner captioned pursuant to 28 USC @ 1331.

The personal property claim contests a 1988 Declaratory Order issued by the PA Public Utility Commission, Respondent, that authorizes jurisdictional utilities "implementing a RMD [remote metering device] program to include in its tariff...a rule whereby the customer must permit the utility access and space for the purpose of installing an automated meter reading device [AMR]". The Order does not require the utility to inform the customer of the right to defend against the use of personal property. Petitioner seeks inter alia, permanent injunction against the use of personal property without consent and a ruling on constitutionality respecting nonconsensual use of personal property.

Respondent is a quasi-judicial state regulatory agency legislated "to supervise and regulate all public utilities doing business within the Commonwealth". Respondent is fully funded by assessment of gross intra-state revenues of regulated public utilities, paid into the General Fund of the State Treasury for Respondent's sole use. By law, Respondent is empowered to "make such regulations not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties"; to set standards for service and facilities inclusive of billing procedures and to approve tariffs. 66 Pa C.S. @ 501(b), see App. 22; 52 Pa Code @ 56.12(5), see App. 23.

EVIDENCE

Pursuant to Respondent's Declaratory Order, Re National Fuel Gas Distribution Corporation, 66 PA PUC

P-860135, 1988, App. 24, the sole utility providing water service in the area where Petitioner resides recently implemented the RMD program and revised its tariff to so provide. By virtue of the Respondent's "customer must consent rule", the utility is authorized to claim Petitioner's personal telephone line for its use in the installation of an AMR to replace the existing meter which Petitioner has the right to read. The AMR device establishes permanent connection to the utility via Petitioner's personal telephone line and electronically transmits readings direct to the utility when the utility activates. As consent is mandated, the utility is authorized to terminate water service if Petitioner refuses the use of her personal telephone line. Petitioner was not advised of the right to defend against the use of personal property without consent.

In complaint, Petitioner contends that Respondent's mandate respecting nonconsensual use of personal telephone lines infringes the procedural and substantive rights of property, restricts liberty and violates the right of contract. Personal property is subject to the same constitutional protection as real property. Amendment 14 of the U.S. Constitution, App. 22, makes no distinction and implicitly regards life, liberty and property as fundamental rights. The right of property by definition embraces the right to refuse its use. Due process requires notice of the right to defend against any action that compromises a fundamental right and denies infringement of substantive rights. Respondent's Order intrudes on Petitioner's liberty by subordinating Petitioner's right to freely make personal choices relative to home conveniences consistent with personal and private needs to the economic and efficiency interests of a business enterprise.

Respondent's Order definitvely alters the service contracted with Bell Tele of PA by imposing conditions not originally included or conceived, i.e. authorizing third party access and use of a contractually arranged service without the consent of both parties in violation of U.S. Const. Art. 1, Sec. 10., see App. 22.

Respecting the claim for fraud, Petitioner contends the adjudication proceeding afforded by Respondent was punctuated by concealment and deception, such as to deny Petitioner the right to prosecute the actual matter in complaint granted by statute and protected by U.S.Const. Amend 14; such as to deny Petitioner information necessary to adequately defend against its actions.

Provisions of Respondent's regulations governing the informal/formal complaint process, not disclosed to Petitioner, grants the right of any person to file complaint with Respondent respecting its orders, 66 Pa C.S. @ 701), App. 22; and, permits the withdrawal of an informal complaint without prejudice to the right to file and prosecute a formal complaint, 52 Pa Code @ 3.112 , App. 23. By law, Respondent is required to make available rules by which a consumer may make informal complaints, Pa. 1986 P.L.114, p 1244 (d)(1), App. 23. Rights granted by statute are protected under the due process clause of the U.S. Const Amend 14.

Respondent does declare in its Order, App. 24, that customer's must consent to the access and use of personal property and authorizes utilities to include same in its tariff.

The written informal complaint, App. 32, addressed to Respondent for response, questioned Respondent's authority

for the nonconsent mandate and its constitutionality respecting the 14th Amendment. Without explanation or advisement, Respondent adjudicated the claim as an objection to AMR installation by the utility for reasons of privacy. Respondent's Decision, App. 27-30, dismissing the complaint on the ground that installation was pursuant to its Order, represented the claim adjudicated as Petitioner's. See App. 27. The claim adjudicated is false bearing no resemblance to the actual. The false claim served to justify adjudication as an objection to AMR installation establishing the utility as party to suit and seeded the successive stages of the adjudication process. Respondent did not advise Petitioner of the right to withdraw or the consequences of appealing, i.e. that the formal stage commences a legal process the outcome of which is reviewable only by the state appellate court. Respondent did advise that a lawyer was not necessary to file an appeal, App. 25.

The formal proceeding constituted the appeal process. The subject matter and party to complaint remained as captioned in the informal false complaint, notwithstanding the statement of complaint provided on the formal complaint form, App. 35. Petitioner's objections, to the utility as party to complaint given that no dispute with the utility was alleged in the actual written complaints filed; to the Respondent's nonparticipation which the nature of the complaint required, were ignored. Respondent's formal complaint form did not provide for identification of "Respondent to Complaint" as required by its regulations. The formal complaint was dismissed for nonattendance at a prehearing with the utility, written participation with preadvisement of the intent to participate in written form notwithstanding. Respondent upheld dismissal with prejudice, exceptions reasserting the above mentioned objections notwithstanding.

Petitioner ascertained subsequent to receipt of Respondent's dismissal that Petitioner's only recourse was to petition the PA Commonwealth Court for review; and that only issues preserved by exception were subject to review. Legal representation was several times declined.

Petitioner filed appeal pursuant to the matters raised by exception. The Court rendered judgment upholding Respondent's dismissal on the basis that Petitioner's complaint objected to AMR installation as asserted by Respondent in its Decision and brief. Respondent's Decision wherein such assertion appears is falsely represented as Petitioner's. The false claim is the only evidence on the record of proceedings to support the adjudication and the state court's judgment; and, is contradicted by the actual complaints filed, also on the record.

It is Petitioner's contention that the adjudication of a false complaint alleged by Respondent to be Petitioner's instituted proceedings irrelevant to Petitioner's stated complaint. Whether Petitioner objected to AMR installation was not relevant to the matter brought before Respondent for adjudication. That, the concealment and nondisclosure of information vital to the assertion of rights and defenses is also "evidence of and equivalent to a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth."; as this Court observed in Stewart v. Wyoming Cattle Ranch Co., 128 U.S. 383, 388-89; 9 S.Ct. 101, 103 (1888). Respondent presented a claim to the state court to support its findings that it had reason to know was false. That Respondent did not disclose information vital to Petitioner's assertion of rights and defenses and that its actions constituted fraud for breach of

legal duty were not ascertained until after the filing of exceptions and after the state court rendered its judgment.

Were it not for concealment and nondisclosure, the informal complaint could have been withdrawn putting an end to the false claim and a formal complaint introduced as an original complaint on a form provided by regulations. This would have enabled Petitioner to exercise the right to designate the party to complaint, would have ensured a hearing on Respondent's authority to mandate consent and its constitutionality with Respondent; and, appellate review on that matter, if Petitioner elected to appeal.

When the State Supreme Court declined to hear the matter, Petitioner commenced this civil action. Respondent moved for dismissal citing inter alia res judicata.

RULINGS

Without hearing the claim for fraud, the District Court, in its Memorandum & Order found for res judicata and held that Petitioner's "constitutional claims could have been litigated before the Administrative Law Judge and the Commonwealth Court", App. 19. Its Order granted the Respondent's motion to dismiss.

The Court of Appeals affirmed the District Court's ruling. In its Opinion, qualified as "Not Precedential", the Court appears to contend that Petitioner's claim for fraud is not barred by res judicata, App. 6, although the legal sufficiency of the claim was not otherwise established.

A petition for rehearing was filed on May 3, 1999 asserting conflict with various Supreme Court rulings that recognize fraud as a bar to res judicata challenge (citing *Stoll*

v Gottlieb, 305 U.S. 165; Riehle v. Margoles 279 U.S. 218 and others) and its own stated policy of nondistinction re extrinsic versus intrinsic fraud (citing *Schum v Bailey 578 F.2d 493 (3rd Cir1978)*. Rehearing was denied May 19, 1999.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted recognizing that the Court of Appeals' judgment signals an abrupt departure from the accepted and usual course set by prevailing legal doctrine established in judicial proceedings; and in result sanctions departure by a lower court, invoke this Court's supervisory power.

The Court of Appeals assertion that Petitioner's "claim that the PUC conducted its adjudication of her complaint in an unlawful manner" is barred by res judicata (App. 6), contradicts admitted exceptions to the general rule of res judicata and its own rulings, as indicated in the following cases.

Because "...fraud vitiates the most solemn contracts, documents, and even judgments", United States v. Throckmorton, 98 U.S. (8 Otto) at 64; given the protection afforded judgments rendered by courts having jurisdiction of party and subject matter by law, exception to the general rule of finality is admitted. "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception..."; or where a lack of "a real contest in the trial or hearing of the case" is shown, such reasons among others may be sufficient to void the prior judgment. See id. at 65-66.

Judgments collaterally attacked for fraud obliges the court to examine the conduct of the parties and if fraud in

obtaining judgment is found, "...deprive [the party] of the benefit...and of any inequitable advantage which they have derived under it". The principle pertains no less to cases "involving rights arising under judicial proceedings in another jurisdiction. Arrowsmith v. Gleason, 129 U.S. at 101.

Pertinent in Marshall v. Holmes 141 U.S. 589, 12 S.Ct. 62, is the observation that relief from prior judgment "could be granted [Mrs Marshall] by reason of the fact, distinctly alleged, that some of the necessary proof [for fraud]...was discovered after the judgments at law were rendered" ; at 601.

The courts developed exceptions to the general rules governing relief from judgments "to fulfill a universally recognized need for correcting injustices..." Hazel-Atlas Glass Co. v. Hartford-Empire Co 322 U.S. 238, 244, 64 S.Ct. 997. Pertinent is the finding that lack of due diligence is not sufficient reason to deny relief, particularly when the matter of fraud affects not just the parties, but the public.

> "...[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.." See id. at 246.

Petitioner contends, in the instant case, it is the institution set up to protect and serve the public's interest that perpetrated the wrong.

Historically, the Court of Appeals has rejected the extrinsic-intrinsic fraud distinction. In Averbach v. Rival Mfg. Co., 809 F.2d 1016 (3rd Cir. 1987) at 1022, the

contention that the "fraud, if any, was intrinsic" was rejected pursuant to the Courts stated policy. *Publicker v. Shallcross, 106 F.2d 949, 950 (3rd Cir. 1939); Bandai America Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 73 (3rd Cir 1985) and Schum v. Bailey, 578 F.2d 493, 506 (3rd Cir. 1978) (Gibbons, J., concurring)* are cited in support.

The Court of Appeals judgment in result sanctions the District Court's dismissal without hearing the claim for fraud to establish legal sufficiency. In contrast, the Court overruled a lower court's decision because the question of plaintiff's possible fraud had not been addressed, Stridiron v. Stridiron, 698 F.2d 204, 208 (3rd Cir. 1983). Respecting legal sufficiency, the Court held that "[i]n determining whether a complaint states a cause of action we are bound to consider not only the statements in the pleading itself but also to draw reasonable inferences in favor of the pleader", Averbach v. Rival Mfg. Co, supra, see footnote at 1020, *citing Quinones v. United States, 492 F.2d 1269, 1273 (3d Cir. 1974).*

CONCLUSION

Wherefore, Petitioner respectfully requests that a writ of certiorari issue to review the Judgment and Opinion of the U.S. Court of Appeals for the Third Circuit entered in this matter.

Respectfully Submitted,

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Date: 8/17/99

UNREPORTED - NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1723

EILEEN WALDEN DANIELS,
Appellant

v.

PA PUBLIC UTILITY COMMISSION

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 98-1524)
District Judge: Honorable Bruce W Kauffman

Submitted Under Third Circuit LAR 34.1(a)
March 5, 1999

Before: SLOVITER, ROTH AND ROSENN
CIRCUIT JUDGES

(Filed Apr 20 1999)

OPINION

PER CURIAM:

Eileen Walden Daniels appeals the District Court's dismissal of her complaint against the Pennsylvania Public Utility Commission (PUC) for reasons of claim preclusion. We will affirm.

The dispute involving Daniels and the PUC began when Philadelphia Suburban Water Co. (PSW) notified Daniels of its intent to install an automated meter reader (AMR) at her residence. Using the customer's telephone line, the AMR transmits data about the customer's water usage to PSW for billing. The PUC approved PSW's use of the AMR; as a result, PSW's customers were required--as a condition of receiving service--to permit PSW to connect AMRs to their telephones.

Daniels objected to the installation of an AMR at her residence, and she ultimately filed a formal complaint with the PUC about the matter. In the complaint, Daniels argued that the PUC's approval of the AMR system violated the Fourteenth Amendment by requiring that she "allow access to [her] personal telephone line for electronic water meter reading or be denied the privilege of having water." Formal Complaint at 3; see also id.. ("In upholding the legitimacy of accessing private telephone lines...without the consent of the customer, the PUC--as an extension of the authority conferred by the citizens of Pennsylvania on its state legislature--violates...constitutional protections").

An application to depose Daniels was presented to an administrative law judge (ALJ), and the ALJ granted the application when Daniels did not object within 10 days of the

request. See 52 PA.Cons.Stat. at 5.343(f). Daniels did not appear for the deposition, however. She later explained that she had "been denied attendance not by my own volition but the deliberate acts of others." Counterresponse to Motion for Sanctions [para] 5. "Graphically put," she stated, "surveillance devices were surgically implanted in my ears and/or sinus cavity without my knowledge and obviously without my consent." Id. Subsequently, the ALJ held a prehearing conference, but again Daniels did not appear.[1] In response the ALJ dismissed Daniels' complaint. On appeal, the PUC upheld the dismissal of Daniels' complaint for her failure to appear. See PUC Opinion and Order at 12-13.

Daniels then petitioned the Commonwealth Court for review of the PUC's order. The Commonwealth Court refused to reach Daniels' substantive arguments, holding instead that "Daniels waived her opportunity to address the merits of her complaint...by failing to appear at the prehearing conference." Daniels v. Pennsylvania Pub.Util. Comm'n, No. 1167 C.D. 1996, slip op. at 7 (Pa. Commw. Ct. 1997); see also id. at 8 (noting that because of her failure to appear at the prehearing conference, Daniels' "resolute position cannot be addressed regardless of its importance or constitutional character"). The Pennsylvania Supreme Court later denied Daniels' request for allowance of an appeal.

Daniels sought no appeal in the United States Supreme Court. Instead, she filed a civil rights complaint in

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1 The PUC also addressed Daniels' objections on the merits. In particular, the Commission rejected Daniels' arguments that (i) the installation of an AMR invaded her right to privacy, see Opinion at 11-12 and (ii) the ALJ's decision to dismiss her complaint without a hearing constituted a denial of her right to due process, see id. at 12-13.

the District Court and named the PUC as the sole defendant. In the complaint Daniels argued that (i) the PUC's policy of permitting utilities to use AMRs violated several provisions of the Constitution[2], see Complaint at 4-5 [para]6, and (ii) the PUC's adjudication of her comlaint was "in violation of judicial law and in derogation of [her] Constitutional rights to petition government for redress and due process," id. at 6 [para] 8. The PUC responded, arguing--inter alia--that claim preclusion barred Daniels' civil rights complaint. The District Court agreed, holding that Daniels' claims were precluded because she could have litigated them in the state courts. See Memorandum and Order at 9.

In the most general terms, the doctrine of claim preclusion "precludes the relitigation of matters based on the same cause of action **that were or could have been raised** and resolved in prior preceeding." Napier v. Thirty or More Unidentified Fed. Agents, Employees or Officers, 855 F.2d 1080, 1086 (3d Cir. 1988)(emphasis added). As the District Court indicated, the Full Faith and Credit Statute (28 U.S.C.at 1738) requires federal courts to give a prior state-court judgment the same preclusive effect as would the state itself. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85-87 (1984)(involving a civil rights complaint). There is, we note, no exception for the decisions of state administrative agencies, at least when the agency decisions have been reviewed by state courts. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 479-85 (1982). Thus, here we must consider whether Pennsylvania's rules of claim preclusion would bar Daniels' claims.

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2 Specifically, Daniels claimed the PUC's policy constituted an unconstitutional taking, violated her right to make personalchoices about her utilities needs, and impaired her right to contract freely with a telephone service. See Complaint at 4-5 (para) 6.

Under Pennsylvania law, for claim preclusion to be successful, "there must be a concurrence of four conditions: 1) Identity of the thing sued upon; 2) Identity of the cause of action; 3) Identity of persons and parties to the action; and, 4) Identity of the quality or capacity of the parties suing or being sued." Stevenson v. Silverman, 208 A.2d 786,787-88 (Pa.1965). In addition, we held in McCarter v. Mitcham, 883 F.2d 196, 199 (3d Cir.1989), that the state would refuse to apply claim preclusion if no prior court had subject matter jurisdiction over the claim. Here, it is clear that Daniels could have brought her constitutional claims in the Commonwealth Court, as that Court's review of PUC orders extends to "whether constitutional rights have been violated." Philadelphia Elec. Co. v. Pennsylvania Pub.Util. Comm"n, 433 A.2d 620 (Pa.Commw.Ct. 1981).

Thus, the question simply becomes whether the four criteria for claim preclusion have been met[3]. As for Daniels' claims that the PUC's policy of permitting utilities to use AMR's is unconstitutional, we hold that the conditions for applying claim preclusion have been met. First, the same "alleged[ly] wrongful act," the proposed installation of the AMR, gave rise to both Daniels' state and federal actions.

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3 We note that Pennsylvania applies these four criteria flexibly. As the Court wrote in Stevenson, claim preclusion:

> should not be defeated by minor differences of form, parties, or allegations, when these are contrived only to obscure the real purpose,--a second trial on the same cause between the same parties...If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule.

Stevenson, 208 A.2d at 788.

See Gregory v.Chehi, 843 F.2d 111, 116 (3d Cir.1988). Similarly, we find that Daniels' two suits involve the same cause of action, because both suits concern a single transaction. See id. at 117 (noting that a single transaction can spawn many claims based on different legal theories). And both suits involve Daniels and the PUC in the same capacities. See id. at 119-120. In addition, we note that Pennsylvania courts apply the doctrine of claim preclusion where, as was the case here, the first court decided the matter on the basis of a litigant's procedural default. See Chandler v. Unemployment Compensation Bd. of Review, 580 A.2d 457, 459 (Pa. Commw.Ct. 1990). Given all this, the PUC was entitled to invoke claim preclusion against these claims, and the District Court properly entered judgment on that basis.

A similar analysis would hold for Daniels' claim that the PUC conducted its adjudication of her complaint in an unlawful manner. In addition, this claim is also barred by the doctrine that federal courts--save the United States Supreme Court--lack jurisdiction to review state court judgments. See Rooker v. Fidelity trust, 263 U.S. 413, 415 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). Here Daniels argued to the state courts that the PUC mishandled her complaint, but the state courts rejected that argument[4]. When Daniels did not appeal that determination

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4 There may also be some overlap in the constitutional claims that Daniels raised in both the state and federal proceedings. To the extent there is overlap, the Rooker-Feldman doctrine also bars our consideration of the claims. Some of the constitutional claims, though, appear to have been raised only in Daniels' federal complaint. Those claims may well be barred only by claim preclusion. See, e.g., FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840-41 (3d Cir. 1996) (noting that Rooker-Feldman only precludes claims actually brought, or in extricably intertwined with claims brought, in state court).

to the United States Supreme Court, her opportunity to obtain review of that determination by a federal court was lost.

Accordingly, for the reasons given, we will affirm the District Court's dismissal of Daniels' complaint.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1723

EILEEN WALDEN DANIELS,
Appellant

v.

PA PUBLIC UTILITY COMMISSION

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C.Civ.No. 98-1524)
District Judge: Honorable Bruce W. Kauffman

Submitted Under Third Circuit LAR 34.1(a)
March 5, 1999

Before: SLOVITER, ROTH AND ROSENN
CIRCUIT JUDGES

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this court that the judgment of the district court entered July 16, 1998 be and the same is hereby affirmed. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk

CLERK

DATED: Apr 20 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN WALDEN DANIELS,	:	
	:	
Plaintiff	:	**CIVIL ACTION**
	:	
v.	:	**NO. 98-CV-1524**
	:	
PA PUBLIC UTILITY COMMISSION,		
	:	
Defendant	:	**FILED JUL 16 1998**

MEMORANDUM & ORDER

Bruce W. Kauffman, J. **July 15, 1998**

Eileen Walden Daniels, proceeding pro se, brings this action against the Pennsylvania Public Utility Commission (the "Commission"). Daniels challenges a regulation of the Philadelphia Suburban Water Company (the "Water Company") requiring certain customers to permit the installation of a device that relays a reading of the customer's water meter to the Water Company via the customer's telephone line. Before the Court is the Commission's motion to dismiss the complaint on the ground, inter alia, that a final judgment by the Pennsylvania Commonwealth Court bars Daniels' claims asserted here. For the reasons set forth below, the motion is granted.

I. Background

The Water Company is a public utility doing business within Pennsylvania, see *66 PA.Cons.Stat.* at 102 (1978 & Supp.1997), and is subject to the supervision of the Commission, *66 PA.Cons Stat.* at 501 (1979). The rules and regulations of the Water Company, filed as part of its "tariff", govern the manner in which water service is provided to its customers. *See 66 PA.Cons.Stat.* at 102. The tariff provisions are reviewed by the Commission, and, once approved, are legally binding on the Water Company and its customers. *See Brockway Glass Co. v. Public Utility Comm'n*, 437 A.2d 1067, 1070 (1981).

> Tariff Rule 27 provides that:
> A meter shall be installed on each domestic and on each fire service line owned by the customer. The company reserves the right to determine the size and type of meter to be installed in the customer's property including whether such meter shall be a manual read meter or a meter that can be read remotely from outside the building being served or automatically using TV cable, telephone, or similar lines or radio signal communications... [I]n the case where the meter is to be read over the telephone lines...the customer must provide the company with the current telephone number used or to be used for meter reading purposes at the property, including any such number that may be unlisted in which event the company shall keep that number confidential....

Philadelphia Suburban Water Company Tariff Rule 27 (June 1994). [Compl., Exhibit "A"] The Water Company may

terminate service to any customer who refuses to allow a Water Company representative "reasonable access to property for purposes of inspecting or for reading, caring for, removing, or installing meters, including remote and automatic meters and the associated wiring and connections to the customer's telephone line." Philadelphia Suburban Water Company Tariff 53 (June 1994). [Compl., Exhibit "B"]

In January 1995, the Water Company notified Daniels of its intent to install in her home a "teleread," an automatic meter that would relay readings to the Water Company over her telephone line. Daniels scheduled a March 18, 1995 appointment to allow the installation, but then canceled the appointment and requested proof that the teleread could not invade her privacy. In response, the Commission provided her with "information on how the system works and answers to 11 common questions concerning its operation or installation [and] numerous publications and letters which assure that the teleread system cannot, and will not, transmit voice communications, and therefore, prevents the teleread device from becoming any type of a surveillance device." [Compl., Exhibit "D"]

Sometime shortly thereafter, the Water Company threatened to terminate Daniels's water service if she refused to allow the installation, and advised her of her right to file a complaint challenging its actions. In an Informal Complaint dated March 22, 1995, Daniels advised the Commission and a representative of the Water Company that "based on [her] reading of the 14th Amendment to the Constitution," she did not think that the Commission had the authority to require the installation of a device that would use her private telephone line. [Compl., Exhibit "C"] After investigating Daniels's

Informal Complaint, an investigator from the Commission's Bureau of Consumer Services determined that the teleread device "complies with the safeguards set in the National Fuel Gas Distribution Corp. decision," and thus adequately addresses an invasion of privacy contention" [1] [Comp., Exhibit "D"] On May 4, 1995, Daniels's Informal Complaint was dismissed.

On June 12, 1995, Daniels filed a Formal Complaint with the Commission questioning the "authority of the Public Utility Commission (PUC) to authorize Philadelphia Suburban Water Company (PSW) to commandeer [her] private telephone line for water meter linkage," and alleging that the teleread violated her rights under the United States Constitution. [Comp., Exhibit "E"] The Formal Complaint was referred to the Water Company and then consolidated with six other complaints that similarly objected to installa-

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1 In *Re National Fuel Gas Distribution Corp.*, P-860135, 66 Pa.P.U.C. 507 (Pa.Pub.Utility Comm'n Mar. 17, 1988), the Commission ordered that when implementing a device that may use a customer's telephone line (an "RMD"), utilities must ensure:

> 1. that an RMD relinquish control of the customer's telephone line when other customer equipment is activated;
> 2. that no RMD capable of transmitting voice communications is allowed unless specific permission is obtained from this Commission prior to installation; and
> 3. that the customer should be given reasonable notice (at least 72 hours) of the proposed RMD installation prior to the actual installation.
> 4. that a utility implementing a RMD program may include in its tariff the requisite notice provision and a rule whereby the customer must permit the utility access and space for the purpose of installing and utilizing an automated meter reading device.

Re National Fuel Gas Distribution Corp., P-860135, 66 Pa.P.U.C. 507 (Pa. Pub. Utility Comm'n Mar. 17, 1988).

tion of the teleread.[2]

On July 6, 1995, the Water Company moved to dismiss the consolidated complaints. An Administrative Law Judge notified Dainels that the motion to dismiss her Formal Complaint would be discussed at a prehearing conference scheduled to occur on July 28, 1995. Daniels did not object to the scheduled conference, and in a letter dated July 27, 1995, she responded to the Water Company's motion to dismiss. As scheduled, a prehearing conference was held in the Phildelphia State Office Building before the Admnistrative Law Judge. Daniels failed to appear or otherwise participate.[3] On December 5, 1995, the Administrative Law Judge issued an Initial Decision dismissing Daniels's Formal Complaint. Daniels v. Philadelphia Suburban Water Co., F-00268958 (Pa.Public Utility Commission, Initial Decision, filed Dec 5, 1995). [4]

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2. See 55 PA.Code at 5.81 ("Consolidation. (a) The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary cost delay.")

3 Complainants who so requested were permitted to participate by telephone or to have matters pertaining to their claims discussed at a later date. Daniels made no such request.

4 In the Initial Decision, the Administrative Law Judge determined that the mandatory installatio of automated meter reading devices is a reasonable condition of service, that the installation does not constitute an invasion of privacy, and that the Water Company's tariff permits the installation. The Judge also found that although Daniels provided a written response to the Water Company's motion to dismiss, she "chose ot to take advantaage of the opportunity to respond orally."

On December 7, 1995, Daniels filed several exceptions to the Initial Decision. On March 28, 1996, in an Opinion and Order signed by Commission Secretary John G. Alford, the Commission denied Daniels's exceptions, adopted the Administrative Law Judge's decision, and ordered that Daniels's Formal Complaint against the Water company be dismissed with prejudice. *Daniels v. Philadelphia Suburban Water Co.*, F-00268958 (Pa. Public Utility Commission, Opinion and Order, entered April 1, 1996).

Following an appeal to the Pennsylvania Commonwealth Court, the court determined that because she failed to raise her claims during the administrative proceedings, Daniels had waived her right to have them heard on appeal. Daniels v. Philadelphia Public Utility Comm'n., No. 1167 C.D. 1996 (Pa.Cmmw. filed January 23, 1997); see Pa.R.App.P. 1551(a). The Pennsylvania Supreme Court denied Daniels's Application for Allocatur. Daniels v.

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and thereby "waived her opportunity to participate pursuant to 66 Pa.C.S. at 332(f) and 52 Pa.Code at 5.246." *Daniels v. Philadelphia Suburban Water Co.*, F-00268958, at 19 (Pa.Public Utility Commission, filed Dec. 5, 1995).

> Title 66 PA.CONS.STAT. at 332(f) provides that:
> Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat,...unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening....66 PA CONS.STAT. at 332(f)(1979); see also 52 PA.CODE at 5.222(d), 5.245(a).

Philadelphia Public Utility Comm'n, No. 0269 M.D. Allocatur Docket 1997 (Pa. filed December 31, 1997).

Daniels instituted this action on March 23, 1998, alleging that installation of the teleread violates her federal constitutional rights under the Contracts Clause of Article 1, the Due Process Clause of the Fourteenth Amendment, and the Takings Clause of the Fifth Amendment. U.S. CONST. art. 1, [Sec.] 10, amends. V, XIV. She seeks permanent injunctive relief and costs.

II. Standard

The Commission argues, *inter alia*, that Daniels's claims are barred by application of res judicata and should be dismissed pursuant to FED.R.CIV.P. 12(b)(6). [5] In deciding whether to dismiss a complaint pursuant to FED.R.CIV.P. 12(b)(6) on the ground that the claims raised therein are barred by the res judicata effect of an earlier lawsuit, the Court considers only the complaint, including any exhibits attached thereto, and matters of public record. See *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); *Pension Benefit Guar.Corp.*, 998 F.2d 1192,1196 (3d Cir. 1993) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURES [Sec.] 1357, AT 299 (2D ED. 1990); See also *Iacaponi v. New Amsterdam Cas.Co.*, 258 F.Supp.

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5 "The rule in this circuit is that affirmative defenses, such as the statute of limitations and res judicata, can be asserted on a motion to dismiss." *Adams v. Gould Inc.*, 739 F.2d 858, 870 n.14(3d Cir. 1984) (citing *Williams v. Murdoch*, 330 F.2d 745, 749 (3d Cir. 1964)).

880 (W.D. Pa. 1966) (dismissing action on basis of res judicata after taking judicial notice of state court proceedings), *aff'd*, 379 F.2d 311,312 (3d Cir. 1967).

III. Discussion

The Full Faith and Credit Act provides that the "judicial proceedings" of any State "shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such State...from which they are taken." 28 U.S.C. @ 1783 (1994). "The Act thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec.Indus.Co. v. Epstein*, 516 U.S. 367, 373 (1996). Accordingly, "[t]o fulfill their @ 1738 obligation, federal courts must look to relevant state (here Pennsylvania) res judicata and estoppel law in determining the effect of state court judgments." *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 181 (3d Cir. 1987); see also *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982) ("It has long been established that @1738...commands a federal court to accept the rules chosen by the State from which the judgment is taken.").[6]

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6 "Although different preclusion rules apply in some circumtances to unreviewed findings of administrative proceedings, ...section 1738 by its own terms applies when administrative findings have been reviewed by state courts of general jurisdiction." *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 326-27 (9th Cir. 1995); see, e.g., *Ivy Club v. Edwards*, 943 F.2d 270, 281 (3d Cir. 1991) (finding that [Sec] 1738 did not bar federal court's adjudication of plaintiff's federal claim where New Jersey state court appeared to have acquiesced to plaintiff's express reservation of its right to litigate its federal claims in federal court, and plaintiff's constitutional claims therefore had "not been adjudicated other than at the state administrative level"); see also *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1266

Under Pennsylvania law, the doctrine of res judicata provides that "a final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies, on the same cause of action." *Delaware River Port Auth. v. Pennsylvania Pub. Utility Comm'n*, 182 A.2d 682, 685 (Pa. 1962); see *Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679, 680-81 (Pa. Super.), appeal denied, 663 A.2d 684 (1995). "A judgment is deemed final for purposes of res judicata or collateral estoppel unless or until it is reversed on appeal." *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996). When the final disposition of an action is invoked as a bar to a subsequent action Pennsylvania courts apply the doctrine of res judicata only if the two actions share an identity of the: (1) thing sued upon or for; (2) cause of action; (3) persons and parties to the action; and (4) capacity of the parties to sue or be sued. *Official Court Reporters of Court of Common Pleas of Phila. County v. Pennsylvania Labor Relations Bd.*, 467 A.2d 311, 319 (Pa. 1983). "The test of the identity of causes of action for the purpose of determining the question of res judicata is the identity of the facts essential to their maintenance." *Long v. Stout*, 157 A.607, 609 (Pa. 1931); see also *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, 701 A.2d 600, 607 (Pa. Cmmw. 1997) ("Causes of action may be considered identical when, in both the current and prior proceedings, the subject matter and the ultimate issues are the same.")

The pleadings and public record show that the Commonwealth Court's judgment involved the same parties, thing sued for, cause of action, and capacity of the parties

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(3d Cir. 1994) ("Traditionally, the Supreme Court has favored application of common-law preclusion doctrines 'to those determinations of administrative bodies that have attained finality.'"(quoting Astoria Fed.Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).

that are involved in the action presently before this Court. Daniels nevertheless argues that res judicata does ot bar her claims because "[t]he complaint as presented to Defendant for adjudication was not litigated. Neither the issue of nonconsenual access and use of personal property recognizing U.S. Constitutional Amendment 14, nor Defendant's authority to so mandate and deny due process were considered in either decision by Defendant or the State Court." [Daniels Reply to Mot to Dismiss at 3.]

"Res judicata applies ot only to claims actually litigated, but also to claims which could have been litigated during the first proceeding..." *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) (citing *Allen v. McCurry*, 449 U.S. 90., 94 (1980)). Had she not waived her right to pursue her constitutional claims, Daniels could have litigated those claims before the Administrative Law Judge and the Commonwealth Court. The Court therefore concludes that under the doctrine of res judicata, the final judgment by the Pennsylvania Commonwealth Court bars Daniels's claims in this lawsuit.

An appropriate Order accompanies this memorandum.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN WALDEN DANIELS	:	
	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	**NO. 98-CV-1524**
	:	
PA PUBLIC UTILITY COMMISSION		
	:	
Defendant	:	

ORDER

AND NOW, this 15th day of July, 1998, upon consideration of the motion to Dismiss filed by the Pennsylvania Public Utility Commission (doc. #3), and the plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED**. The plaintiff's complaint is **DISMISSED**, and the Clerk shall mark this case **CLOSED.**

BY THE COURT:

s/ BRUCE W. KAUFFMAN

(Entered 7/16/98)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-1723

EILEEN WALDEN DANIELS,
Appellant

v.

PA PUBLIC UTILITY COMMISSION

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, STAPELTON, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, RENDELL, AND ROSENN, * Circuit Judges

The petition for rehearing filed by Appellant Eileen Walden Daniels in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/SLOVITER
Circuit Judge

Dated: May 19 1999

*Hon. Max Rosenn, Senior Circuit Judge, as to panel rehearing only.

PERTINENT TEXT CITATIONS

Article 1, Section 10, U.S. Constitution:

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; *pass any* bill of attainder, ex post facto law, or *law impairing the obligation of contracts*; or grant any title of nobility."

Amend 14, Section 1, U.S. Constitution:

"All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

66 Pa.C.S. @501(b):

"The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. *The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties."*

66 Pa C.S. @701:

"...*Any* public utility, or other *person*, or corporation likewise *may complain of any regulation or order of*

the commission, which the complainant is or has been required by the commission to observe or carry into effect..."

52 Pa Code @ 3.112:

"(b) Upon the completion of the Commission's investigation of an informal complaint, the Commission staff will notify the informal complainant of the results of its review and investigation and of the staff recommendations, if any, to the Commission. *The filing or a withdrawal of an informal complaint is without prejudice to the right of the complainant to file and prosecute a formal complaint."*

52 Pa. Code @56.12(5):

"Remote reading devices for water, gas and electric utilities. A utility may render a bill on the basis of readings from a remote reading device under the following conditions:

(1) when a water utility uses readings from a remote reading device to render bills, the utility shall obtain an actual meter reading at least once every three years to verify the accuracy of the remote metering device."

PA 1986 P.L. 114 at 1244(d)(1):

"...The commission shall adopt, publish and generally make available rules by which a consumer may make informal complaints..."

PA PUBLIC UTILITY COMMISSION
DECLARATORY ORDER

Re National Fuel Gas Distribution Corporation
Additional petitioner: Equitable Gas Company
P-860135
66 PA PUC 507, 1988

"...IT IS ORDERED...

3. That utilities implementing RMD programs which employ telephone utility systems proceed in accordance with the following standards:

1. that an RMD relinquish control of the customer's telephone line when other customer equipment is activated;
2. that no RMD capable of transmitting voice communications is allowed unless specific permission is obtained from this Commission prior to installation; and
3. that the customer should be given reasonable notice (at least 72 hours) of the proposed RMD installation prior to the actual installation.

4. That a utility implementing a RMD program may include in its tariff the requisite notice provision and a rule whereby the customer must permit the utility access and space for the purpose of installing and utilizing an automated meter reading device."

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

May 4, 1995

BCS No: 0268958

E W DANIELS
1838 COBDEN ROAD
LAVEROCK PA 19038

The bureau of Consumer Services (BCS) has completed its investigation into your complaint. Attached is the Bureau's decision resulting from that investigation. Unless you appeal this decision, you are obligated to keep the terms of the decision.

Anyone involved with this complaint may appeal this decision. If you want to apeal you must request a formal hearing. You can do this by filling in the Request for Appeal form on the last page of this letter. You must return this form to the Pennsylvania Public Utility Commission by the appeal date shown on the Request for Appeal form. If you return this form after the appeal date, your appeal may be dismissed by the Commission unless you can demonstrate a good cause for filing late.

You do not need a lawyer to file an appeal.

Please remember that you must pay your current bills for utility service even if you file an appeal.

Very truly yours

s/ James Farley
Utility Complaints Investigator

Enclosure

MARILYN GALLAGHER
PHILADELPHIA SUBURBAN WATER COMPANY
762 W LANCASTER AVE
BYRN MAWR PA 19010

BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION

Date: May 4, 1995

E.W. DANIELS
1838 COBDEN RD
LAVEROCK PA 19038

V. BCS No: 0268958

PHILADELPHIA SUBURBAN WATER COMPANY
762 W. LANCASTER AVE
BYRN MAWR PA 19010

Acct.No: 02G107062000

DECISION ON INFORMAL COMPLAINT BY THE BUREAU OF CONSUMER SERVICES:

STATEMENT OF COMPLAINT:

The above-captioned informal complaint was received by the Bureau of Consumer Services on March 24, 1995 from Eileen Daniels. In the complaint it was alleged that:

(1) The customer had scheduled an appointment to allow the company to install a teleread device on her service on March 18, 1995.

(2) The customer has delayed the installation because of information the customer has received regarding the right to privacy.

(3) The company has advised the customer that the teleread device cannot invade her privacy but did not provide any evidence backing up this information.

(4) The customer requests proof that the teleread device cannot invade her privacy.

INVESTIGATION BY STAFF OF THE BUREAU OF CONSUMER SERVICES REVEALED:

(1) That according to company records the company has provided the customer with the following information concerning the teleread device. Information on how the system works and answers to 11 common questions concerning it operation or installation. Numerous publications and letters which assure that the teleread system cannot, and will not, transmit voice communications, and therefore, prevents the teleread device from becoming any type of surveillance device.

(2) That according to company records the customer had schedule an appointment to install the teleread device on March 18, 1995.

(3) That according to company records on March 16, 1995 the customer contacted the company and stated she had changed her mind and cancelled the appointment scheduled for March 18, 1995. The customer stated while the company supplied information on the device was reassuring, she still remained sceptical because of the lack of concrete proof that the teleread equipment could be used as a surveillance device.

(4) That the company approved tariff section covering meters is shown as Attachment A.

(5) That the Commission has issued previous formal decisions involving complaints where customers of this utility have disputed being required to install the teleread device. Under Docket Number C-00946147 a customer filed a complaint which stated the customer did not want the company connecting their meter and or equipment to the

telephone line in his home. The Commission found during this formal complaint that the Commission has previously repeatedly upheld the legitimacy of automated meter reading devices such as the teleread device. The cost saved by the use of such equipment, resulting in lower utility rates than would otherwise be the case, justify depriving individual customers of choice for the greater public interest. The Commission has said "The customer should not be given the option of refusing installation of the equipment. To permit customer discretion in this area would be inefficient and uneconomical. In a previous case concerning this equipment Re National Fuel Gas Distribution Corp., 66 Pa.P.U.C. 507 (1988), the Commission ordered, among other things, the following: That utilities implementing RMD programs which employ telephone utility systems proceed in accordance with the following safeguards:

(1) That an RMD relinquish control of the customer's telephone line when other customer equipment is activated.
(2) That no RMD capable of transmitting voice communications is allowed unless specific permission is obtained from this Commission prior to installation; and
(3) That the customer should be given reasonable notice (at least 72 hours) of the proposed RMD installation prior to the actual installation.
(4) That the utility implementing a RMD program may include in its tariff the requisite notice provision and a rule whereby the customer must permit the utility access and space for the purpose of installing and utilizing an automated meter reading device. It was noted that the Commission has held that compliance by a public utility with the safeguards set forth in Re National Fuel Gas Distribution Corp. ade-

quately addresses an invasion of privacy contention. This order was docketed under C-00902793.

(5) That the company teleread equipment complies with the safeguards set forth in RE National Fuel Gas Distribution Corp. formal decision.

BASED ON THESE FINDINGS, THE BUREAU OF CONSUMER SERVICES CONCLUDES THAT:

(1) That the Public Utility Commission has jurisdiction over this dispute.

(2) That the Commission has previously decided that as long as the teleread device complies with the safeguards set in the National Fuel Gas Distribution Corp decision it adequately addresses an invasion of privacy contention.

(3) That the company teleread device complies with the safeguards required by the Public Utility Commission.

THEREFORE, IT IS DECIDED THAT:

1) That the informal complaint of E.W. Daniels is hereby dismissed.

2) *That to avoid termination of service the customer must schedule an appointment with the company and allow installation of the teleread device within thrity (30) days of the date of this decision.*

Copies of this decision will be issued to all participants in the complaint. Any questions concerning the terms of this decision or concerning the Public Utility Commission's appeal procedures may be directed to the Bureau of Consumer Services at 1-800-782-1110.

s/James Farley
Utility Complaint Investigator
Bureau of Consumer Services
PA Public Utility Commission

[*Emphasis added.*]

REQUEST FOR APPEAL FROM CONSUMER SERVICES DECISION

Please send me formal complaint forms at the address listed below.

0268958
BCS Number

May 4, 1995
Date of Mailing

_____
Signature

Company Name:
PHILADELPHIA SUBURBAN WATER COMPANY
762 W LANCASTER AVE
BYRN MAWR PA 19010

CUSTOMER NAME AND ADDRESS

_____
(Area Code) Telephone no.

Please correct any mistakes
in your name and address.
E W DANIELS
1838 COBDEN ROAD
LAVEROCK PA 19038

Mail this completed form to: Secretary
PA Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3254

THIS SLIP MUST BE RETURNED WITHIN 20 DAYS OF THIS DATE: May 4, 1995 APPEAL DATE

March 22, 1995

Mr. Joseph E. Delzingaro
Phila Suburban Water Co...
762 W. Lancaster Avenue
Bryn Mawr, Pa 19010-3489

PA Public Utility Commission
Bureau of Services
PO Box 3265
Harrisburg, Pa 17105

Re: Your letter of March 17 1995 / Complaint to PUC

Dear Mr. Delzingaro:

Responding to your latest advisement referenced above, thank you for the copy of PUC's recent decision concerning an individual's right to refuse installation on the grounds of preference. Although that was not the substance of my complaint, I did request the authorizing agent for installation and telephone access be identified for purposes of establishing legality. As I believe my communications make clear, my primary concern is that of surveillance opportunity.

Clearly, the PUC/PSW's right to install meters or upgrade systems for improved delivery and assessment is not in dispute so long as that right does not infringe on any of my constitutionally protected rights. Note that in responding to the above request you identified PUC as the authorizing agent for installation and by implication, me (the customer) as the authorizing agent for accessing my telephone line because the installation is to be done in my home, not at Bell. Given PUC's mandate for the installation of the ARM [sic] which allows no refusal by customers, *given that my private telephone line is a prerequisite for that installation, the question becomes whether the PUC has the authority to force or otherwise coerce me to comply. On the basis of my*

reading of the 14th Amendment of the Constitution which stipulates that "...no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process...", I consider that the PUC does not have that authority. In consideration of your specific advisement, I am directing this issue to the attention of PUC for response, by copy. It is curious to note that the above mentioned decision does not address.

I strongly concur with Mr. Madison's view that "...the right of freely examining...measures, and of free communication thereon, is the only effectual guardian of every other right..." and I will continue to delay installation of the ARM [sic] until all necessary information pertaining to its technology and the matter of PUC's authority is [sic] satisfactorily concluded. With respect to technology, and contrary to your assertions, it appears that the ARM [sic] system (of which the MIU is a part) does have surveillance capability according to PUC. The Commissions directive to utilities regarding RMD (ARM)[sic] included the provision "...that no RMD capable of transmitting voice communications is allowed unless specific permission is obtained from this Commission prior to installation;..." (See page 7, item 2 of PUC's decision.) Under what circumstance or condition would such surveillance be permitted. How would my right to privacy be secured beyond the representations and assurances made by PSW or PUC? Is the RMD with surveillance capability different in design making it readily distinguishable from an RMD without surveillance capability? *Clearly, there is a need for more information on this issue which I hereby request PUC to provide as permitted under the Freedom of Information Act and any other law that pertains.*

Thank you for your attention. I will await PUC's determination concerning the issues herein addressed.

E. W. Daniels
Laverock, Pa 19038

PUC...
PSW...

[*Emphasis added.*]

FORMAL COMPLAINT FORM
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Please Print:

1. Your Name, Mailing Address and Telephone Number

"(Mrs) Eileen W. Daniels
1838 Cobden Road
Laverock PA 19038
Montgomery County 215 572-1820"

2. Which company does your complaint concern?

Name of Company "Philadelphia Suburban Water"

3. What is your complaint? [Presented as]

"Attachment "A"

The decision reached by the Bureau of Consumer Services (BCS) does not address complaint as submitted; i.e. the authority of the Public Utility Commission (PUC) to authorize Philadelphia Suburban Water Company (PSW) to commandeer my private telephone line for water meter linkage.

Given the constitutional protections guaranteed all U.S. citizens, recognizing that such protections extend to their property and personal effects, it is my constitutional right and duty as a citizen to question PUC's mandate that I allow access to my personal telephone line for electronic water meter reading or be denied the privilege of having

allow access to my personal telephone line for electronic water meter reading or be denied the privilege of having water until I comply. That stipulated penalty for not obeying said mandate was duly threatened by PSW when they alerted me to their intent to shut-off my water in ten (10) days if I did not schedule an appointment for RMD installation; a fact that was omitted from the summary presentation rendered by BCS in their decision.

Our government is constituted to derive its powers from the consent of the governed with due regard for the rights of the individual explicit and implied in the Bill of Rights and succeeding amendments. As indicated in my original complaint, the 14th amendment appears pertinent to the matter in contention. That amendment prohibits the state from enacting or enforcing laws that abridge the privileges and immunities of U.S. citizens or denies them life, liberty or property without due process. In upholding the legitimacy of accessing private telephone lines, or alternatively, TV cables, radio signal communications or other lines connected to private property (at the citizen's disgression [sic]) without the consent of the customer; the PUC--as an extension of the authority conferred by the citizens of Pennsylvania on its state legislature--violates those constitutional protections.

In our constitutionalized democracy, economic efficiency (even if established in the particular) must not be achieved at the expense of individual freedoms as our history of slavery and its devastating consequences make plain. Nor, can the greater public good be served by violating the constitutional and human rights of its citizens.

4. What do you want the Public Utility Commission to do about your complaint? [Presented as]

Attachment "B"

Revise and amend Phildelphia Suburban Water's Rules and Regulations to comply with the United States Constitution. PSW must obtain permission of customer for access to telephone lines, TV cables, radio signal communications or other lines connected to the customers property for personal and private use. PSW cannot compel or otherwise coerce customers by threat of water shut-off for not granting permission.

PSW must demonstrate real savings to customers in their effort to obtain consent.

5. You must sign and date your complaint.
The information I have placed on this form is true and correct to the best of my knowledge. I understand that I could be punished under Pennsylvania State Law if I purposely give false information.

s/Eileen W. Daniels — 6/8/95

Signature of complaining person or officer (if customer is a corporation, trust or association) or member (if customer is a partnership). Make sure the complaint form with your original signature is one of the copies you return to the Commission.

Date Signed

6. If you are represented by a lawyer you must provide your lawyer's name, address and telephone number.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
SEP 14 1999
CLERK

99-627

No. 98-1723

IN THE
Supreme Court of the United States

EILEEN WALDEN DANIELS,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Pennsylvania Public Utility Commission

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's dismissal of Ms. Daniels' case based on claim preclusion where Ms. Daniels did litigate her claims before the state court and could have adjudicated her remaining claims there?

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IN THE

Supreme Court of the United States

No. 98-1723

EILEEN WALDEN DANIELS,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION

Respondent Pennsylvania Public Utility Commission respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Third Circuit in this case. The Court of Appeals' opinion is unreported but is attached as Appendix A to Petitioner's Petition.

COUNTERSTATEMENT OF THE CASE

In light of the requirements of Supreme Court Rule 15,[1] Respondent is compelled to set forth the correct statement of the facts leading to the filing of the present writ for certiorari.

[1] Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs.

Petitioner Eileen Walden Daniels filed a formal complaint with the Pennsylvania Public Utility Commission (hereinafter "PUC") on June 12, 1995, as a appeal from an informal determination of the PUC's Bureau of Consumer Services. Petitioner sought to name the PUC as the defendant in that action, but complaints filed against a tariff of a utility are filed against the utility, not the PUC. See PUC Opinion and Order of April 1, 1996, attached as Appendix A. Accordingly, the PUC proceeding named the utility, Philadelphia Suburban Water Company (hereinafter "PSW"), as the defendant.[2]

The formal complaint, in the nature of a de novo proceeding, alleged a variety of statutory and constitutional reasons why the PUC should not authorize PSW to install a remote water meter reading device over her telephone line.

The PSW filed its answer dated July 6, 1995, asserting its right to install an automatic meter reading system that permits PSW to read customers' meters over the telephone

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[2] A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Petitioner claims that the PUC's refusal to name the PUC as the defendant constitutes fraud since the attempts to attack a PUC order which had become final in 1988, thus was not subject to appeal. Her complaint was the application of a tariff provision to her, and the case was fashioned to allow her due process rights in questioning the tariff provision.

lines without a visit from the meter reader. PSW moved to dismiss the complaint and to take Petitioner's deposition. After a ten-day period in which Petitioner failed to object, the PUC administrative law judge (hereinafter "ALJ") granted the application and, by letter dated July 17, 1995, served notice on Petitioner for a deposition to be held on July 25, 1995.

Although no objections were filed to the ALJ order, by letter dated July 21, 1995, Petitioner stated that she would not appear due to the alleged "physical restraints of apparent governmental 'supervision' " and that she needed to "minimize exposing others and myself to contrived harassment, selective discrimination or worse."

On July 27, 1995, PSW moved for sanctions and sought to dismiss the complaint. By letter dated July 27, 1995, Petitioner filed a "Counterresponse to Respondent's Memorandum of Law in Support of Answer and Motion to Dismiss." By letter dated July 28, 1995, Ms. Daniels replied to PSW's motion for sanctions alleging that the request for a deposition was "an empty exercise, if not a plot to intimidate or harass . . . ." She further alleged, "I have been denied attendance not by my own volition but the deliberate acts of others. . . . Graphically put, surveillance devices were surgically implanted in my ears and/or sinus cavity without my knowledge and obviously without my consent." *See* Appendix B, Counterresponse to PSW's Motion for Sanctions.

Pursuant to a motion by PSW, the ALJ consolidated Petitioner's complaint with four others and scheduled a hearing for July 28, 1995. PSW and other complainants appeared and presented testimony but Petitioner failed to appear at the hearing. The ALJ issued an initial decision on November 15, 1995, which would have resulted in the dismissal of all complaints with no further proceedings if

no exceptions had been filed. Petitioner and another complainant filed exceptions, however, which were denied by PUC order entered April 1, 1996.

Petitioner appealed to the Commonwealth Court of Pennsylvania, which affirmed the PUC order by opinion filed January 23, 1997, *Eileen W. Daniels v. Pa. Publ. Util. Comm'n,* No. 1167 C.D. 1996 (opinion not reported), attached as Appendix C. Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, *Eileen W. Daniels v. Pa. Publ. Util. Comm'n,* No. 269 M.D. Allocatur docket 1997, which was denied. She then filed an Application for Reconsideration which was denied on December 31, 1997, *Eileen W. Daniels v. Pa. Publ. Util. Comm'n,* 550 Pa. 686, 704 A.2d 640 (1997).

No petition for writ of certiorari was filed with the United States Supreme Court for review of the matter on its merits.

Petitioner filed a complaint in the United States District Court for the Eastern District of Pennsylvania, serving the PUC on March 31, 1998. The PUC filed a Motion to Dismiss on April 17, 1998, citing lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to join an indispensable party (PSW). On July 15, 1998, the Honorable Bruce W. Kauffman, Judge, issued his Memorandum and Order which granted the PUC's motion to dismiss, attached to Petition as an unnumbered Appendix.

Petitioner sought review from the United States Court of Appeals for the Third Circuit, which affirmed the district court's decision by opinion filed April 20, 1999, attached to Petition as an unnumbered Appendix. Petitioner asked for reconsideration, which was denied by order dated May 19, 1999.

ARGUMENT

Petitioner's complaint filed in the federal district court raised nothing that either was not raised or could not have been raised in the state court actions. Both the federal district court and the Third Circuit recognized that the present complaint was barred by the principles of claim preclusion as well as the *Rooker-Feldman* doctrine. The decision for which Petitioner seeks review (1) presents no conflict with the decision of another United States court of appeals; (2) decides no important federal question at all, certainly not in a way which conflicts with a decision by a state court of last resort; and (3) neither departs from the accepted and usual course of judicial proceedings nor sanctions such a departure from a lower court within the meaning of U.S. Supreme Court Rule 10. Nothing in the Third Circuit's decision warrants review by this Court.

Petitioner asks this Court to review the Third Circuit's affirmance of the district court's grant of the Respondent's motion to dismiss based on claim preclusion. Petitioner filed a formal complaint with the PUC, had the opportunity to litigate her case before the Respondent PUC and failed to either participate or offer a legitimate reason for her lack of participation. She appealed the PUC's decision to the Commonwealth Court of Pennsylvania and sought but was refused review of the Pennsylvania Supreme Court. She failed to petition the U.S. Supreme Court for review of the state court decision.

I. THE THIRD CIRCUIT DECISION IS CONSISTENT WITH CASES DECIDED BY OTHER FEDERAL COURTS

The doctrine of claim preclusion is well-settled in federal law. Claim preclusion prohibits the relitigation of matters based on the same cause of action that were or

could have been raised and resolved in a prior proceeding. *Napier v. Thirty Or More Unidentified Fed. Agents, Employees or Officers*, 855 F.2d 1080, 1086 (3d Cir. 1988). Under the Full Faith and Credit Statute, 28 U.S.C. § 1738, a federal court is required to give a prior state court judgment the same preclusive effects as the state court would. *Matsushita Electric Industrial Co., Ltd., et al. v. Epstein, et al.*, 516 U.S. 367 (1996); *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75 (1984). Moreover, there is no exception for state agency decisions which have been reviewed by state courts. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

This Court has spoken clearly on the matter in the above cases, and the Third Circuit followed this Court's directives in the present case. This petition presents no conflict between the United States courts of appeals and is consistent with the usual course of judicial proceedings.

II. NO FEDERAL QUESTION IS PRESENTED BY THIS PETITION

Although Petitioner states that the Court is presented with a question of constitutional importance, in fact, that is not the case. What is before the Court is the court of appeals' affirmance of the district court's application of claim preclusion where all relevant aspects of the case either were brought in state court or could have been brought in state court.

The substance of the case falls within the ambit of state law, not federal. *See* 66 Pa. C.S. §§ 501(b), 1501, regarding the authority of the Pennsylvania Public Utility Commission to supervise and regulate public utilities, and the duty of the public utilities to furnish and maintain adequate, efficient, safe and reasonable service. The PUC adopted a regulation which expressly permits utilities to

install remote meter reading devices. 52 Pa. Code § 56.12(5). The regulation went into effect subject to the usual safeguards, with ample opportunity for public comment, approval of the legislative standing committees and the Independent Regulatory Review Commission, as well as a review for legality from the Pennsylvania Office of Attorney General.

Pursuant to the regulation, the PSW submitted its Tariff Supplement No. 11 to Water-Pa. P.U.C. No. 15, Second Revised Page No. 32, approved by the Commission effective June 1, 1993, which provides that the PSW may eliminate service if a customer refuses to have an AMR installed. Once a tariff is effective, it has the force of law and is binding on the utility, its customers, and the PUC. *Brockway Glass Co. v. Pa. Publ. Util. Comm'n*, 437 A.2d 1067, 1070 (Pa. Cmwlth. Ct. 1981).

Since the area of utility regulation regarding customer service is within the purview of the state, not federal government, then the federal courts have no jurisdiction regarding the terms of customer service of a state-regulated utility. In order to create a federal claim, Petitioner alleges that the tariff's requirement that a customer permit the placement of the automated meter reading device on her telephone constitutes an unlawful taking of her property without just compensation. Pennsylvania law allows a utility customer to question the application of a tariff through the PUC informal and formal complaint process, from which an appeal to the Commonwealth Court of Pennsylvania may be taken. *See* PUC Opinion and Order, Appendix A.

Petitioner followed this procedure. Petitioner filed a formal complaint against the PUC with the PUC, and the PUC rewrote the caption to name the utility as the defendant. Although this is routine procedure for complaints

brought against utilities regarding sections of their tariffs, Petitioner believes that the naming of the utility instead of the PUC is fraudulent in some way. In fact, it permitted the Petitioner to continue with her litigation, since there would have been no recognizable complaint permitted against the PUC itself regarding the application of a utility's tariff.

After receiving an adjudication from the PUC, she appealed the matter to the Pennsylvania Commonwealth Court, which affirmed the PUC decision. Her petition for allowance of appeal to the Supreme Court of Pennsylvania was denied.

Petitioner did not file a petition for writ of certiorari to the United States Supreme Court, thereby extinguishing her right to litigate the subject matter of her complaint. The present petition for writ of certiorari has not preserved any legitimate question except whether the Third Circuit's affirmance of the district court's dismissal of Petitioner's complaint based on claim preclusion was appropriate.

CONCLUSION

This case presents no compelling reasons for granting certiorari, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held March 28, 1996

Commissioners Present:

John M. Quain, Chairman
Lisa Crutchfield, Vice Chairman
John Hanger
David W. Rolka
Robert K. Bloom

VINCE HYSLOP	F-00264210
GERALDINE E. KAUDERER	C-00956561
ELAYNE AION	C-00956593
DANIEL C. DAVIS	C-00956632
ROCCO J. DINIGLIO	C-00956633
ARTHUR and LAURA LOEB	F-00264111
EILEEN W. DANIELS	F-00268958

v.

PHILADELPHIA SUBURBAN WATER COMPANY

OPINION AND ORDER

Before the Commission for consideration and disposition are the Exceptions filed by Eileen W. Daniels ("Daniels") on December 7, 1995, and the Exceptions filed by Geraldine E. Kauderer ("Kauderer") on January

2, 1996, to the Initial Decision of Administrative Law Judge ("ALJ") Cynthia W. Fordham which was issued on November 27, 1995, in the above-captioned proceeding. On February 15, 1996, Philadelphia Suburban Water Company filed *Letters in Lieu of Reply Exceptions.*

HISTORY OF THE PROCEEDING

1. Kauderer filed a Formal Complaint with the Pennsylvania Public Utility Commission ("Commission") against Philadelphia Suburban Water Company ("PSWC", "Company", or "Respondent") on February 7, 1995.

2. In this Complaint, docketed at C-009956561, Kauderer alleged, *inter alia*, that she did not realize that an automated meter reading ("AMR") device had been installed on the property before she moved in. She objected to sharing a private telephone line with PSWC, further asserting that she wants to be provided with a non-invasive means of having her water meter read. Until another method can be established, she offered to call in her meter reading on a monthly basis.

3. On February 21, 1995, PSWC filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss. The Company asserted that the terms of its duly approved tariff authorizes it to install AMR devices which can be read over the customer's telephone line. (See PSWC Tariff Supplement No. 11 to Water Pa. P.U.C. No. 15, Second Revised Page No. 22).

4. On February 23, 1995, Elayne Aion ("Aion") filed a Formal Complaint with the Commission against PSWC. In that Complaint, docketed at C-00956593, Aion alleged that the installation of the Tele-read system is an invasion of privacy. She objected to a permanent connection between her home and PSWC's computers for any reason.

5. On March 10, 1995, the Company filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss, in reference to the Complaint docketed at C-00956593.

6. On March 3, 1995, Dr. Daniel C. Davis ("Davis") filed a Formal Complaint with the Commission against PSWC. In that Complaint, docketed at C-00956632, Dr. Davis stated that although he is the owner of the property, he works in Washington, D.C. during the week and is seldom at the property. The telephone is listed in the name of the occupant, who does not want the Tele-read system to be installed.

7. On March 22, 1995, PSWC filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss, in reference to the Complaint docketed at C-00956632. Dr. Davis responded to PSWC's filings on March 27, 1995, stating that he never established telephone service at this property.

8. Rocco J. DiNiglio ("DiNiglio") filed a Formal Complaint with the Commission against PSWC on March 2, 1995. In the Complaint, docketed at C-00956633, Mr. DiNiglio stated that he does not want the Tele-read system installed. He will arrange to have scheduled meter readings.

9. On March 22, 1995, PSWC filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss, in reference to the Complaint at C-00956633.

10. On March 13, 1995, Arthur and Laura Loeb ("Loeb") filed a Formal Complaint with the Commission against PSWC. In that Complaint, docketed at F-00264111, the Loebs objected to the installation of the Tele-read

device which monitors their phone line. They alleged that the installation of the device violates their right to privacy, infringes on their freedom of choice, and prevents them from using their phone line at their discretion.

11. On March 27, 1995, PSWC filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss, in reference to the Complaint at F-00264111.

12. Vince Hyslop ("Hyslop") filed a Formal Complaint with the Commission against PSWC on March 22, 1995. In that Complaint, docketed at F-00264210, he asserted that he does not want the Tele-read system. He requested that PSWC maintain or repair the telephone line, if needed.

13. On April 4, 1995, PSWC filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss, in reference to the Complaint at F-00264210. On April 22, 1995, Mr. Hyslop replied by stating that he merely wants PSWC to maintain or repair the telephone line.

14. On June 12, 1995, Daniels filed a Formal Complaint with the Commission against PSWC. In that Complaint, docketed at F-00268958, Daniels questioned the authority of the Commission to authorize PSWC to use her private telephone line for water meter linkage. She alleged that her constitutional rights are being violated.

15. On July 6, 1995, PSWC filed an Answer, a Motion to Dismiss, and a Memorandum of Law in Support of Answer and Motion to Dismiss, in reference to the Complaint at F-00268958.

16. On May 23, 1995, PSWC filed a Petition for Consolidation and Declaratory Order ("Petition"). Since

the Petition for Declaratory Order was originally assigned to a Bureau other than the Office of Administrative Law Judge, ALJ Fordham only addressed the Petition for Consolidation in her Order dated June 28, 1995. The Petition was served on eight Complainants, including Mr. Hyslop, Dr. Davis, Mr. DiNiglio, Kauderer, Mr. and Mrs. Loeb, the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA"), but there were no responses filed to the Petition.

17. Pursuant to Section 5.81 of the Commission's Regulations, 52 Pa. Code § 5.81, the ALJ consolidated the cases docketed at C-00956561, C-00956593, C-00956632, F-00264111, F-00264210, F-00268958. In addition, the ALJ informed the parties that PSWC's Motion to Dismiss would be discussed at the Prehearing Conference.

18. The Prehearing Conference in these cases was scheduled for July 28, 1995. The morning session was an in-person Prehearing Conference. To accommodate Messrs. Davis and DiNiglio, an afternoon telephonic conference was scheduled. In response to Kauderer's request for a continuance, her Prehearing Conference was scheduled for August 25, 1995.

19. After the notice was given, Mr. Hyslop sent a Letter, dated June 24, 1995, stating that he would not be able to attend the Prehearing Conference. In another Letter, dated July 11, 1995, Mr. Hyslop objected to the ALJ's Order consolidating the cases.

20. On July 6, 1995, PCWC submitted an Application for Deposition for Daniels. Since Daniels did not object, the Application was granted on July 17, 1995.

21. By correspondence, dated July 21, 1995, Daniels objected to the deposition scheduled for July 25, 1995.

After Daniels failed to appear at the deposition, PSWC's counsel submitted correspondence, dated July 25, 1995, requesting that sanctions be imposed pursuant to Sections 5.371 and 5.372 of the Commission's Regulations, 52 Pa. Code §§ 5.371 and 5.372, and that the Complaint of Daniels should be dismissed.

22. On July 27, 1995, PSWC hand delivered a Motion for Sanctions. By correspondence, dated July 27, 1995, Daniels responded to PSWC's Motion to Dismiss.

23. At 10:00 a.m. on July 28, 1995, a Prehearing Conference was held in the Philadelphia State Office Building before ALJ Cynthia W. Fordham. Elayne Aion and Arthur and Laura Loeb appeared *pro se*. Vince Hyslop and Daniels did not appear. PSWC was represented by counsel. Two of PSWC's employees were also present, and one of them presented testimony.

24. At 2:00 p.m. on July 28, 1995, a Telephonic Prehearing conference was held. Daniel C. Davis and Rocco J. DiNiglio participated by telephone. Counsel for PWC and PSWC's two employees were also present.

25. On August 25, 1995, a Prehearing Conference was held in the Philadelphia State Office Building. Kauderer appeared *pro se*. PSWC was represented by counsel. In addition, one of PSWC's employees was also present.

26. The record consists of three transcripts. Since the court reporters numbered the pages on each transcript separately, the transcripts were referred to by the ALJ in the following manner: the July 28, 1995 transcript is AM Tr.; the July 28, 1995 afternoon transcript is PM Tr.; and the August 25, 1995 transcript is Aug. Tr. AM Tr.. consists of 59 pages. PM Tr. consists of 19 pages. Aug. Tr. consists of 23 pages.

27. The following eight (8) exhibits were introduced: Hyslop Exhibit 1—Mr. Hyslop's correspondence dated June 24, 1995; Hyslop Exhibit 2—Mr. Hyslop's correspondence dated July 11, 1995; Daniels Exhibit 1—Application for deposition of Daniels dated July 6, 1995: Daniels Exhibit 2—Order granting Application for Deposition dated July 17, 1995; Daniels Exhibit 3—Daniels' correspondence, dated July 21, 1995, objecting to the deposition; Daniels' Exhibit 4—Correspondence of PWC's counsel, dated July 25, 1995, requesting sanctions for Daniels' failure to appear; Daniels Exhibit 5—PSWC's Motion for Sanctions; and Daniels Exhibit 6—Daniels' correspondence, dated July 27, 1995, responding to PSWC's Motion to Dismiss.

28. The Initial Decision for ALJ Fordham was issued on November 27, 1995. The ALJ recommended that the Complaints filed by Vince Hyslop, Kauderer, Elayne Aion, Daniel C. Davis, Rocco J. DiNiglio, Arthur and Laura Loeb, and Daniels against PSWC be dismissed with prejudice.

29. On December 7, 1995, Daniels filed the subject Exceptions to the Initial Decision.

30. On January 2, 1996, Kauderer filed the instant Exceptions to the Initial Decision.

31. By Order entered January 18, 1996, the Commission noted that the Initial Decision of ALJ Fordham had become final without further Commission action, pursuant to the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. § 332(h). We further noted that the Complaints filed by Vince Hyslop, Kauderer, Elayne Aion, Daniel C. Davis, Rocco J. DiNiglio, and Arthur and Laura Loeb against PSWC, at Docket Nos. F-00264210, C-00956561, C-00956593, C-00956632,

C-00956683 and F-00264111, are all dismissed with prejudice.

32. By Secretarial Letter dated January 19, 1996, Kauderer was informed that her Exceptions were filed untimely.

33. By Letter from Kauderer, received at the Commission on December 22, 1995, Kauderer noted that per her conversation with the Director of the Office of Special Assistants, on December 18, 1995, she had received a ten day extension, or until December 28, 1995, in which to file her Exceptions.

34. By Secretarial Letter dated February 8, 1996, the Commission informed Kauderer that the Order entered herein on January 18, 1996, in which the Commission acted to dismiss her Complaint, had been entered erroneously *as to her Complaint*. The Commission rescinded that Order insofar as it applied to her Complaint.

35. By Secretarial Letter dated February 12, 1996, the Commission informed Kauderer that its Letter of January 19, 1996, which stated that her Exceptions were untimely filed, was erroneous, in light of the extensions for filing which she had received and, therefore, her Exceptions would be considered by the Commission.

36. On February 15, 1996, PSWC filed two Letters: a *Letter in Lieu of Reply Exceptions* [1] in response to the Exceptions of Daniels, and a *Letter in Lieu of Reply Exceptions* in response to the Exceptions of Kauderer.

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[1] PSWC notes, in its Reply to the Exceptions of the Complainant, that the Company"s Reply is untimely because the Complainant did not serve it with a copy of her Exceptions. PSWC requests that, in light of this procedural deficiency, we accept its *Letter in Lieu of Reply Exceptions* as a Reply to the Exceptions of the Complainant.

DISCUSSION

Premised on her review, evaluation, and analysis of the record as developed, the ALJ arrived at the following Conclusions of Law, on pages 20-21 of her Initial Decision.

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. The burden of proof in this proceeding is upon the Complainant pursuant to 66 Pa. C.S. § 332(a).

3. A hearing is necessary to resolve questions of fact and is not required to decide questions of law, policy of discretion. *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission,* 128 Pa. Comomnwealth Ct 259, 563 A.2d 548 (1989).

4. A utility may not be barred from instituting a condition of service as long as it is reasonable. *Pennsylvania Public Utility Commission v. York Water Company,* Docket No. R-842732 (February 21, 1985); *Re National Fuel Gas Distribution Corporation and Equitable Gas Company for Declaratory Order,* 66 Pa. PUC 507 (1988).

5. Installation of automated meter reading devices promotes more efficient and economical meter reading and customers should not be allowed to refuse the installation. *Andrezeski v. National Fuel Gas Distribution Corporation,* Docket No. C-902793 (August 24, 1990).

6. Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen

> the disposition of any matter accomplished thereat . . . . 66 Pa. C.S. § 332(f) and 52 Pa. Code § 5.246.

(I.D., pp. 20-21).

We note at the outset that the Exceptions of Daniels and Kauderer are not in strict compliance with Section 5.533(b) of our Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.533(b), which provides that:

> (b) An exception shall be stated in specific, numbered paragraphs, identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. *Supporting reasons for the exception shall follow a specific exception.* (Emphasis Added)

We recognize, however, that Daniels and Kauderer are appearing *pro se* in this proceeding. Traditionally, we have been hesitant to rule unfavorably against *pro se* litigants based on technical grounds. See, e.g., *Destefano v. Peoples Natural Gas Company*, 56 P.a P.U.C. 489 (1982); *Halpern v. The Bell Telephone Company of Pennsylvania*, Docket No. C-00923950 (October 19, 1992); *William Schlinder v. The Bell Telephone Company of Pennsylvania*, Docket No. F-00161252 (March 26, 1993). Indeed, in our view, it is in the public interest that all litigants, particularly pro se litigants, be afforded a meaningful opportunity to be heard. *Carlock v. The United Teelphone Company of Pennsylvania*, Docket No. F-00163617 (July 14, 1993).

Accordingly, we will address the merits of Daniels' and Kauderer's Exceptions.

In Daniels' Exception No. 1, she argues that the ALJ committed misrepresentation by omission of facts. She further contends that the ALJ's decision to consolidate the proceedings constitutes reversible error. She asserts

that the ALJ's improper consolidation of cases renders moot "all subsequent action taken against my claim including its dismissal".

With regard to the assertion that the ALJ committed misrepresentation by omission of facts, we reply that, in determining the weight to be attached to the testimony of a witness, it is proper to consider his appearance, general bearing, conduct on the stand, demeanor, manner of testifying, and even the intonation of his voice. Thus, credibility is a matter within the purview of the ALJ, since the ALJ was present during the testimony of the witness. *Danovitz v. Portnoy*, 399 Pa. 599, 161 A.2d 146 (1960). With regard to the consolidation of the Daniels proceeding with the other proceedings herein, we not that Section 5.81 of our Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.81, permits a presiding officer to order the consolidation of proceedings "involving a common question of law or fact". We find that the ALJ did not abuse her discretion in this regard, since the consolidated proceedings all involved a common question of law or fact Accordingly, Daniels' Exception No. 1 is denied.

Daniels' Exception No. 2 refers to the ALJ's discussion of the issue of burden of proof, in which the ALJ noted that the proponent of a rule or order must prove its case "by a preponderance of the evidence".

In this proceeding, the burden was on Daniels, as the proponent of a rule or order, to prove by a preponderance of the evidence that PSWC has violated the Public Utility Code or a Regulation or Order of the Commission. Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a). The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the

evidence presented by the other side. *Se-Ling Hosiery v. Marqulies*, 364 Pa. 45, 70 A.2d 854 (1950). Because we conclude that Daniels did not sustain her burden of proof herein, Daniels' Exception No. 2 is accordingly denied.

In Exceptions Nos. 3 and 4, Daniels contends that the mandatory installation of an AMR device would constitute an invasion of her privacy. She further argues that the mandatory installation of and AMR device involves the use of private property without the consent of the owner, and also involves an intrusion on the part of the Company into her personal contractual arrangements.

We find that we acted well within the bounds of our authority when we authorized PSWC to install AMR devices on customer premises. The use of AMR devices as a means of obtaining accurate and actual meter readings is standard practice for public utilities in Pennsylvania.

We have, in a long line of cases, rejected the view that the installation of AMR devices interferes with a customer's right of privacy. Our view is grounded on the belief that the public view often outweighs individual preference. *Springirth v. National Fuel Gas Distribution Corp.*, Docket No. C-902786, 1991 Pa, P.U.C. LEXIS 44, at *11 (April 12, 1991). In our generic Order concerning AMR devices, we observed that our own regulations require customers to give a utility access to regular meters as a condition of service. *Re National Fuel Gas Distribution Corporation*, 66 Pa. PUC 507 (1988). We have further determined that customer concerns regarding invasion of privacy are adequately addressed in the safeguard provisions in utility tariffs with respect to control of the customer's telephone line, the capability of AMRs to carry voice communications and reasonable notice of in-

tent to install such devices. *Andrezeski v. National Fuel Gas Distribution Corp.*, 1991 Pa. PUC LEXIS 81 at *6 (May 2, 1991).

Accordingly, Daniels' Exceptions Nos. 3 and 4 are denied.

In Exceptions Nos. 5 and 6 Daniels contends that she was not informed of the ALJ's decision to dismiss her claim, and that she was not afforded an opportunity to explain her position orally. Daniels further asserts that by not offering her an opportunity to be heard, the Commission has denied her her constitutional right to due process.

Pursuant to Section 703(b) of the Public Utility Code, 66 Pa. C.S. § 703(b), we may dismiss any complaint without a hearing if, in [our] opinion, a hearing is not necessary in the public interest. In our opinion, Daniels has not demonstrated in this proceeding that a factual dispute exists. It is well settled that a hearing is necessary only to resolve disputed questions of fact, and is not required to resolve questions of law, policy, or discretion. *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 128 Pa. Commonwealth Ct. 259, 563 A.2d 548 (1989); *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 128 Pa. Commonwealth Ct. 276, 563 A.2d 557 (1989). Recently, one of our ALJs granted a Motion of PSWC, and dismissed a Complaint on this same issue without an oral hearing. The ALJ reasoned that "the Commission has plowed this ground before on numerous occasions and no useful purpose would be served by a hearing on the record". *Day v. Philadelphia Suburban Water Company*, Docket F-00283772, Initial Decision issued January 25, 1996.

Accordingly, Daniels' Exceptions Nos. 5 and 6 are denied.

Daniels' Exceptions Nos. 7 and 8 consist of a single statement that the ALJ's conclusions of law and Order "can only be appropriately applied to those cases concerning PSWC". In our view, this statement of Daniels constitutes a bald assertion in that it is unsupported by any reasoning or reference to the record as developed in this proceeding.

As bald assertions without any supporting rationale, Daniels' Exceptions Nos. 7 and 8 are summarily denied.

We now turn to the Exceptions of Kauderer which were filed on January 2, 1996. The gravamen of Kauderer's Exceptions is that PSWC's installation, maintenance, and operation of an AMR device on her private residence constitutes an invasion of her constitutional right to privacy.

We shall deny Kauderer's Exceptions for the same reasons articulated *supra* in response to Daniels' Exceptions Nos. 3 and 4.

CONCLUSION

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Initial Decision and the Exceptions taken thereto. Premised upon our review, we find that the ALJ's Initial Decision is amply supported by substantial evidence in the record. We further conclude that the Exceptions of Daniels and Kauderer are not meritorious and, as a result, they are denied; THEREFORE,

IT IS ORDERED:

1. That Exceptions filed by Eileen W. Daniels on December 7, 1995, to the Initial Decision of Administra-

tive Law Judge Cynthia W. Fordham, be, and hereby are, denied.

2. That the Exceptions filed by Geraldine E. Kauderer on January 2, 1996, to the Initial Decision of Administrative Law Judge Cynthia W. Fordham, be, and hereby are, denied.

3. That the Initial Decision of Administrative Law Judge Cynthia W. Fordham issued on November 27, 1995, be, and hereby is, adopted as the action of the Commission, consistent with this Opinion and Order.

4. That the Complaint filed by Eileen W. Daniels against Philadelphia Suburban Water Company at Docket No. F-00268958 be, and hereby is, dismissed with prejudice.

5. That the Complaint filed by Geraldine E. Kauderer against Philadelphia Suburban Water Company at Docket No. C-00956561 be, and hereby is, dismissed with prejudice.

6. That the record at Docket No. F-00268958 be, and hereby is, marked closed.

7. That the record at Docket No.. C-00956561 be, and hereby is, marked closed.

BY THE COMMISSION,

/s/ John G. Alford
JOHN G. ALFORD
Secretary

(SEAL)

ORDER ADOPTED: March 28, 1996

ORDER ENTERED: Apr. 1, 1996

APPENDIX B

July 28, 1995

The Honorable Cynthia W. Fordham
Pennsylvania Public Utility Commission
Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130

Re: Eileen W. Daniels v. Philadelphia Suburban Water Company—Docket No. F-00268958

Dear Judge Fordham:

In acknowledging copy of motion to sanction submitted by respondent's counsel in the above referenced matter, I enclose the original and two copies of my counter-response for consideration.

Appropriate copy will also be forwarded the individuals designated for copy below.

/s/ Eileen W. Daniels
EILEEN W. DANIELS
1938 Cobden Road
Laverock, PA 19038

cc: John Alford, Secretary, PUC
Wendell Holland, Esquire
Robin Sheldon, Esquire

Docket No. F-00268958

EILEEN W. DANIELS

v.

PHILADELPHIA SUBURBAN WATER COMPANY

PHILADELPHIA SUBURBAN WATER COMPANY'S MOTION FOR SANCTIONS COUNTERRESPONSE BY COMPLAINANT

1. Exception taken:

Complaint was filed with the Commission at the direction of PSW on March 22, 1995, because PSW could not adequately address the issue of authority. The Commission's Bureau of Consumer Services responded to that complaint on May 4, 1995. I appealed the Bureau's decision because it did not address the issue of authority. In accordance with procedure prescribed by the Commission, that appeal was formalized on June 8th and acknowledged by the Commission on June 12th.

2. No Exception taken

3. Exception taken:

It must be noted, as indicated in my July 21st communication, addressed to Judge Fordham, that I considered the request for deposition to be an empty exercise, if not a ploy to intimidate or harass because the document(s) requested to be furnished at deposition had already been furnished, i.e. the complaint. Counsel's client is the originator/recipient of any and all related documents. Oral examination would prove uneventful because the

consideration is a constitutional one. Therefore, I had reason to expect the order would not be granted and no reason to think I had to make formal objection even though I did not know I could.

4. No Exception

5. Exception taken:

It should be noted that a copy of the letter in question was mailed to counsel on the same day as the original (July 22nd) and should have reached counsel's office no later than July 24th in the a.m. Being acutely aware of the power and control afforded some to interfere by reason of my circumstance, I considered it prudent (since the fax number was made available to me by counsel via letter) to fax counsel a copy of the letter to ensure receipt before the scheduled deposition date. The letter makes clear that I have been denied attendance not by my own volition but the deliberate acts of others, and in such a manner so as to compromise not only the integrity of the proceeding and participants but any and all events which I see and/or hear whether or not I am directly involved. Graphically put, surveillance devices were surgically implanted in my ears and/or sinus cavity without my knowledge and obviously without my consent.

6. Exception taken:

That which denies fair and equal treatment denies just and fair resolution. The end cannot be independent from the means. Knowing that my circumstance introduces undue influences that have no constitutional or moral basis, obligates me to so inform the court. Implicit in the motion as proposed by counsel is that certain information deemed critical to respondent's defense has been denied or could be gleaned from the discovery process,

which I understand to be the purpose of a deposition. Yet, the issue requiring judicial review is one of authority, authority exercised by the Commission albeit in the interest of the people, which is being contested. Based on the information I received, I was directed to advise Mr. Wendell Holland, counsel for respondent in addition to the court, which was done.

7. Exception taken:

Again, I have no formal complaint with PSW, but with the Commission. It is the fact that I am held to a different 'rule of law' (proof of which can be had by court ordered testimony and medical examination) and my resistance to tyrannical rule that limits if not defines the approach I must take in defending myself or property. Counsel will note, this involuntary condition was referred to in my correspondence with PSW.

Of final note, I find it curious that counsel elected to phone me about the deposition and that such calls were made while I was in the midst of preparing the July 21st communication.

In conclusion, I submit that motion should be denied due to unusual and severe circumstance, if not improper identification of respondent.

Respectfully submitted,

/s/ Eileen W. Daniels
EILEEN W. DANIELS
Complainant

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1167 C.D. 1996
Submitted: December 13, 1996

EILEEN M. DANIELS,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

OPINION NOT REPORTED

PER CURIAM MEMORANDUM OPINION
Filed: January 23, 1997

Eileen Daniels petitions for review of the order of the Pennsylvania Public Utility Commission (PUC) denying her exceptions to the decision of the administrative law judge (ALJ) and dismissing her complaint against the Philadelphia Suburban Water Company (PSW) with prejudice.

On June 12, 1995, Daniels filed a formal complaint with the PUC against PSW objecting to the installation of an automated meter reading device (AMR) that permits PSW to read the water meter at her residence through her

private telephone line.[1] Daniels challenged the PUC's authority to allow PSW use of her private telephone line for water meter linkage and alleged that the AMR would violate her constitutional right to privacy. Based on her views, she requested that the PUC revise PSW's tariff to require the company to obtain the permission of a customer, such as herself, before permitting access to a private telephone line. After PSW filed an answer and a motion to dismiss Daniel's complaint, her case was consolidated with six other complaints challenging the AMR by the assigned ALJ.

On July 6, 1995, PSW submitted an application to depose Daniels. Daniels did not respond to the application within ten days pursuant to the regulations, 52 Pa. Code § 5.343(f). On July 17, 1995, the ALJ granted the application setting the deposition for July 25th. (Reproduced Record 76a-77a). On July 21st, Daniels objected by letter.[2] Daniels failed to appear at the scheduled depo-

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[1] AMR devices automatically transmit data from the meter to the company by use of the telephone system on the property. PSW's tariff permits it to install the device throughout its service territory, indicating that the equipment "shall not be capable of transmitting voice communications and shall relinquish control of the customer's telephone line when other customer equipment using that telephone line is activated." Philadelphia Suburban Water Company Tariff Supplement No. 11 to Water-Pa. P.U.C. No. 15, second revised, p. 22. The reading of the meter takes less than three seconds when activated by a telephone call. (R.R. 98a). For a discussion of other safeguards on the AMR devices, *see* decision of the ALJ, dated November 15, 1995, at R.R. 54a-55a. Customers are required as a condition of service to permit PSW to connect the automatic meter reading devices to the customer's telephone.

[2] Daniels stated in this letter that she believed she could not appear in person due to alleged surveillance of her which would compromise the integrity of the process. She stated:

> Under the physical restraints of apparent governmental "supervision", I am subject to involuntary servitude of a na-

siton on July 25th. Based on this failure, PSW filed a motion for sanctions pursuant to 52 Pa. Code §§ 5.371 and 5.372. On July 27, 1995, Daniels responded to PSW's motion to dismiss by letter, and the next day responded to PSW's motion for sanctions by letter.[3]

On June 28, 1995, the ALJ set a prehearing conference for the consolidated complaints for July 28, 1995, and informed the parties that PSW's motions to dismiss, to all complaints, would be addressed at the prehearing conference.[4] Daniels failed to attend the prehearing conference. Based on Daniels' failure to appear at the prehearing conference, in addition to her earlier failure to appear at the deposition, the ALJ dismissed her complaint.

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ture and scope that makes real Orwell's prophetic 1984 wherein physical surveillance via surgical implants was the way of life. Notwithstanding the equal protection provision of our constitution, I have yet to receive requested information/advisement or support of any kind from the law enforcement community or certain elected or appointed officials even though the devices transmitting sight and sound were surgically implanted without my knowledge. . . . I am not free to participate as an equal in any proceeding legal or otherwise without fear or apprehension for my welfare and for the welfare of those with whom I interact; . . . [Therefore] I make great effort to avoid verbal and/or visual contact leaving written communication my only recourse.

(R.R. 106-107a).

3 In response to the motion for sanctions, Daniels stated that: "I have been denied attendance not by my own volition by the deliberate acts of others. Graphically put, surveillance devices were surgically implanted in my ears and/or sinus cavity without my knowledge and obviously without my consent." (R.R. 118a).

4 The ALJ accommodated all complanants who made special requests for the prehearing conference, that is, two complainants were heard in a telephone conference and one complainant was permitted to postpone to a later date. Daniels did not object to the date for the prehearing conference or request any accommodations, such as to attend via telephone.

Based on the arguments made at the prehearing conference, the ALJ also dismissed the other complaints because there were no disputed issues of fact and holding that the law is well established that AMR devices can be mandated as a condition of service by the PUC. The ALJ found that PSW's tariff authorizes it to install these devices and held that prior cases have established that the AMR devices do not constitute an invasion of privacy.

Daniels filed exceptions to the ALJ's decision with the PUC. Daniels excepted to the consolidation of the complaints and alleged that she was denied an opportunity to be heard. The PUC held that the ALJ did not abuse her discretion in consolidating the complaints because, in compliance with the regulations, 52 Pa. Code § 5.81,[5] they all involved a common question of law. The PUC also held that hearings are not required if there are no unresolved factual issues.[6] Daniels' exceptions also raised the merits of her complaint, particularly, whether the AMR is an invasion of privacy. Although addressing all of her exceptions, the PUC held that the ALJ did not abuse her discretion in dismissing Daniels' complaint based on her failure to appear. In conclusion, the PUC denied Daniels' exceptions, adopted the decision of the ALJ as its own and dismissed her complaint with prejudice. Daniels then filed this petition for review.[7]

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[5] 52 Pa. Code § 5.81 provides, in pertinent part:

> The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated.

[6] Citing *Lehigh Valley Power Company v. Pennsylvania Public Utility Commission*, 563 A.2d 548 (Pa. Cmwlth. 1989).

[7] This court's scope of review of the PUC's order dismissing Daniels' complaint is limited to determining whether constitutional rights were violated, an error of law was committed, or whether

Daniels presents numerous contentions as to the merits of her complaint. Her main contention is that the PUC improperly handled her complaint by describing it as a complaint against PSW when it was actually against the PUC, asserting that the PUC has no authority to require the installation of AMR devices as a condition of service. Again, Daniels contends that the use of her private telephone lines without her consent for the AMR is an invasion of privacy. The PUC counters that the issue before this court is whether Daniels' complaint was properly dismissed based on her failure to appear at the prehearing conference. It argues that whatever factual or legal issues Daniels could have presented before the ALJ were deemed waived by her failure to attend.

The ALJ had the authority to order a prehearing conference under Section 333(a) of the Public Utility Code (Code), 66 Pa. C.S. § 333(a)[8] and under Section 332(f) of the Code:

> Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat . . . unless the presiding officer shall determine that failure to be represented was unavoidable. . . .

See also 52 Pa. Code § 5.245.

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the PUC's findings were supported by substantial evidence. *U.S. Steel Corp. v. Pennsylvania Public Utility Commission*, 450 A.2d 1073 (Pa. Cmwlth. 1982).

[8] Section 333(a) of the Code provides, in pertinent part:

> The presiding officer shall have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding.

Daniels had adequate notice of the scheduling of the prehearing conference; however, she failed to appear. She asserts now that the ALJ could have her nonattendance under Section 332(f) of the Code. While this is true, she failed to provide any evidence to the ALJ that her failure was "unavoidable" as required by the Code. In fact, she did not respond to the order setting the prehearing conference in any way. In her responses to the motion to dismiss and the motion for sanctions, she did not inform the ALJ that she would not appear at the conference nor refer to any excuse for failing to appear.[9]

The order setting the prehearing conference informed Daniels that PSW's motion to dismiss her complaint would be addressed at the prehearing conference. Therefore, Daniels waived her opportunity to address the merits of her complaint and the motion to dismiss by failing to appear at the prehearing conference. All of the issues she now attempts to argue could have been argued at the prehearing conference. She cannot avoid her failure by raising those issues before the PUC on exceptions or before this court. An issue not preserved before the agency cannot be raised on apppeal. *Borough of Ridgway v. Pennsylvania Public Utility Commission*, 480 A.2d 1253 (Pa. Cmwlth. 1984). Moreover, because the burden of proof was on Daniels to prove the allegations of her complaint,[10] when she failed to appear to provide any evidence

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[9] In Daniels' July 21, 1995 letter, she mentioned the "likelihood that I will also be denied attendance at the prehearing of my complaint that you have scheduled for July 28, 1995." (R.R. 106). Although demonstrating that she had actual knowledge of the scheduling of the prehearing conference, this statement fails to request an alternative method for the conference or even to definitively inform the ALJ that she would not be attending.

[10] Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides:

[T]he proponent of a rule or order has the burden of proof. Daniels, as the complainant challenging either PSW's action

or legal argument, she also failed to meet her burden of proof.[11]

Although Daniels vehemently argues that the PUC has no authority to approve the use of her private telephone lines by PSW, and that such use is a violation of her constitutional rights, her resolute position cannot be addressed regardless of its importance or constitutional character. Because, under Section 332(f) of the Code, all of these arguments were waived before the ALJ, we must affirm the dismissal of her complaint.

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under an approved tariff or the PUC's lack of authority to approve a portion of that tariff, was the proponent of an order. *See generally Schellhammer v. Pennsylvania Public Utility Commission*, 629 A.2d 189 (Pa. Cmwlth. 1993).

11 Because her failure to appear at the prehearing conference supports the dismissal of her complaint on its own, we need not address Daniels' failure to appear at the scheduled deposition.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1167 C.D. 1996

EILEEN M. DANIELS,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

ORDER

PER CURIAM

AND NOW, this 23rd day of January, 1997, the order of the Pennsylvania Public Utility Commission, dated April 1, 1996, Docket No. F-00268958, is affirmed.